International Convention for the Protection of All Persons from Enforced Disappearance

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Committee on Enforced Disappearances

Concluding observations on the report submitted by Germany under article 29, paragraph 1, of the Convention*

1. The Committee on Enforced Disappearances considered the report submitted by Germany under article 29, paragraph 1, of the Convention (CED/C/DEU/1) at its 80th and 81st meetings (CED/C/SR.80 and 81), held on 17 and 18 March 2014. At its 95th meeting, held on 27 March 2014, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the report submitted by Germany under article 29, paragraph 1, of the Convention and the information contained in the report. The Committee also appreciates the constructive dialogue with the delegation from the State party on the measures taken to implement the provisions of the Convention, which has dispelled many of its concerns, and particularly welcomes the openness with which the delegation responded to the questions raised by the Committee. In addition, the Committee thanks the State party for its written replies (CED/C/DEU/Q/1/Add.1) to the list of issues (CED/C/DEU/Q/1), as supplemented by statements by the delegation, and the additional information submitted in written form.

B. Positive aspects

3. The Committee commends the State party for having ratified almost all of the United Nations core human rights instruments and their optional protocols, as well as the Rome Statute of the International Criminal Court.

4. The Committee also welcomes the fact that the State party has recognized the competence of the Committee under articles 31 and 32 of the Convention, in respect of individual and inter-State communications.

5. The Committee further commends the State party for having consulted with civil society in the context of the elaboration of its report submitted under article 29, paragraph 1, of the Convention.

* Adopted by the Committee at its sixth session (17–28 March 2014).

C. Principal subjects of concern and recommendations

6. The Committee considers that, at the time of the drafting of the present concluding observations, the legislative framework in force in the State party for preventing and punishing enforced disappearances was not in full compliance with the obligations incumbent on States that have ratified the Convention. The Committee therefore recommends that the State party take account of its recommendations, which have been made in a constructive and cooperative spirit, with the aim of ensuring that the existing legal framework and the way it is implemented by the State authorities, at both the federal and *Land* level, are fully consistent with the rights and obligations set out in the Convention.

Definition and criminalization of enforced disappearance (arts. 1–7)

7. The Committee notes that the State party considers, as confirmed by its delegation, that "the existing norms suffice to prosecute and sanction cases of enforced disappearance". However, it notes that the State party has shown openness to examining whether an amendment to the criminal code in this respect may be called for. As far as it is concerned, after reviewing the criminal offences referred to by the State party, the Committee considers that they are not sufficient to encompass adequately all the constituent elements and modalities of the crime of enforced disappearance, as defined in article 2 of the Convention, and thus comply with the obligation arising from article 4. As a rule, the Committee considers that reference to a range of existing offences is not enough to meet this obligation as the offence of enforced disappearance is not a series of different crimes, but rather a complex and single offence, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State through several criminal modalities, that violates various rights. In this context, the Committee considers that the criminalization of enforced disappearance as a separate offence would enable the State party to comply with the obligation under article 4, which is closely related to other treaty obligations concerning legislation, such as those in articles 6, 7 and 8 (arts. 2, 4, 6, 7 and 8).

8. **The Committee recommends that the State party adopt the necessary legislative measures to make enforced disappearance an autonomous offence in line with the definition contained in article 2 of the Convention; that the offence be punishable by appropriate penalties which take into account its extreme seriousness; and, in conformity with article 6, paragraph 1 (a), of the Convention, that the attempt to commit an enforced disappearance be punishable.**

9. **The Committee invites the State party, when criminalizing enforced disappearance as an autonomous offence, to establish the specific mitigating and aggravating circumstances provided for in article 7, paragraph 2, of the Convention. It also recommends the State party to ensure that mitigating circumstances will in no case lead to a lack of appropriate punishment. In addition, the Committee invites the State party to provide that, once criminalized, the offence of enforced disappearance is not subject to any statute of limitations or, if it is, it recommends that the State party ensure that, in line with article 8 of the Convention, the statute of limitations is of long duration and proportionate to the extreme seriousness of the offence and, taking into account the continuous nature of enforced disappearance, that it commence from the moment when the offence ceases.**

Criminal responsibility and judicial cooperation in relation to enforced disappearance (arts. 8–15)

10. The Committee welcomes the fact that domestic legislation provides for the unrestricted principle of universal jurisdiction for enforced disappearances that amount to crimes against humanity. With regard to enforced disappearances that do not amount to crimes against humanity, the Committee notes the information provided by the State party concerning the requirement under domestic legislation that, in order for Germany to exercise jurisdiction in the cases described in articles 9, paragraphs 1 (b) and (c), and 2 of the Convention, the act must be punishable at the place of the offence or the place of the offence must not be subject to any criminal law enforcement. In this regard, the Committee takes note of the assertion by the State party that "the criteria for determining that a given offence is liable to punishment at the place at which it was committed are relatively easy to meet" (CED/C/DEU/Q/1/Add.1, para. 23) and of that by the delegation that "the existing legal norms allow Germany to exercise its jurisdiction in all cases listed in article 9 of the Convention", as well as of the clarifications it provided in this respect during the dialogue (art. 9).

11. **The Committee recommends that the State party adopt the necessary measures with a view to ensuring that the exercise of jurisdiction by the courts over offences of enforced disappearance is fully guaranteed, in accordance with the obligations arising from article 9 of the Convention, in particular the principle of *aut dedere aut judicare* set out in that article. In this regard, the State party should ensure that no conditions which are not provided for in the Convention affect the exercise of jurisdiction by the German courts, in conformity with article 9 of the Convention.**

12. The Committee takes note of the information received regarding the use of German territory and airports for the transfer of detainees suspected of having participated in terrorist activities, who have been deprived of the protection of the law. With respect to the replies provided to the list of issues (CED/C/DEU/Q/Add.1, paragraphs 41 to 45), the Committee remains concerned about the fact that the investigations mentioned in paragraphs 44 and 45 were terminated (arts. 12 and 16).

13. **The Committee reminds the State party of its obligation to undertake effective investigations into all illegal transfers or renditions that are alleged to have occurred in its territory, calling to account all authorities and officials, regardless of their nationality, who have been involved to any degree. The Committee recommends that the State party adopt measures regarding those policies which may have facilitated a violation of the rights of the persons concerned, thereby placing them outside the protection of the law. It further recommends that cooperation with third States in relation to counter-terrorism be conditional upon compliance with international obligations under human rights treaties.**

Measures to prevent enforced disappearances (arts. 16–23)

14. The Committee welcomes the information provided by the State party on the existing legal framework concerning the prohibition of refoulement, although it notes that no specific reference is made under domestic law to enforced disappearance. The Committee also takes note of the information provided by the delegation with regard to the declaration made by Germany on article 16 of the Convention, in particular the affirmation that even if Germany withdraws the declaration, there would be no practical effects. However, the Committee is concerned that such a declaration might have the effect of setting up a standard for the application of the obligation of non-refoulement, which may be inconsistent with the standard provided for in article 16 (art. 16).

15. **The Committee recommends that the State party consider explicitly incorporating into its domestic legislation a prohibition on carrying out an expulsion, return, surrender or extradition where there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance. The Committee further invites the State party to consider withdrawing its declaration on article 16 of the Convention and recommends that it ensure that, in practice, the obligation of non-refoulement is implemented in a manner that is consistent with the standards set in the said provision and that it is the most conducive to protection from enforced disappearance.**

16. The Committee notes that "in general, Germany is prepared to accept diplomatic assurances serving to rule out the assumption that factors preventing deportation exist that are specific to the State to which the person concerned is to be transferred" and that, in assessing such assurances, it applies the relevant principles established by the European Court of Human Rights (CED/C/DEU/Q/1/Add.1, paragraph 59). It also notes the information provided by the delegation in this respect, in particular the statement that diplomatic assurances are no longer accepted in practice in relation to deportations and that they can only play a role in relation to extraditions, in which case the threshold applied is very high (art. 16).

17. **The Committee recommends that the State party adopt all the necessary measures to ensure that diplomatic assurances are effectively evaluated with the utmost care and that they are not accepted in any case where there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance.**

18. The Committee, while noting that it has not been able to verify the information, welcomes the assurance provided by the State party that "the stipulations of article 17, paragraph 3, of the Convention are being complied with in Germany without exception" (CED/C/DEU/Q/1/Add.1, paragraph 62). In addition, it notes the information provided by the delegation that registers are subject to the scrutiny of superiors and that sanctions can be imposed if they are not adequately completed and/or updated (arts. 17 and 22).

19. **The Committee recommends that the State party keep up its efforts to ensure that all registers and/or records of persons deprived of their liberty are accurately and promptly completed and updated, at both the federal and *Land* level, with at least the information required under article 17, paragraph 3, of the Convention. In addition, the Committee recommends that the State party adopt the necessary measures to ensure that records are regularly subject to verification and that, in case of irregularities, the officials responsible are duly sanctioned in accordance with the law.**

20. The Committee takes note of the establishment of the National Agency for the Prevention of Torture to serve as the national preventive mechanism under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which consists of the Federal Agency for the Prevention of Torture and the Joint Commission of the Länder for the Prevention of Torture. However, it is concerned at the lack of adequate resources assigned to it. In this respect, the Committee takes note of the information provided by the delegation that negotiations for the improvement of resources are under way (art. 17).

21. **The Committee recommends that the State party adopt all necessary measures, including the speeding up of the negotiations currently taking place, to ensure that the institutions comprising the National Agency for the Prevention of Torture have sufficient financial, human and technical resources to discharge their mandate efficiently. The Committee also recommends that the State party ensure that all**

authorities cooperate with these institutions in the discharge of their mandate and provide them with all the necessary assistance within their power.

22. The Committee welcomes the information provided with regard to the training of public officials on matters that are linked to the Convention, including the safeguards it comprises, as well as the statement by the delegation that the Convention is taken up in the context of the training provided. Nevertheless, the Committee notes that no specific training on the relevant provisions of the Convention in terms of article 23 is being provided (art. 23).

23. **The Committee recommends that the State party adopt the necessary measures, with a view to ensuring that all law enforcement personnel, whether civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty, including judges, prosecutors and other court officials of all ranks, receive, at both the federal and *Land* level, appropriate and regular training on the provisions of the Convention, as provided by article 23.**

Measures to provide reparation and to protect children against enforced disappearance (arts. 24 and 25)

24. The Committee takes note of the position of the delegation of the State party in connection with the fact that justice was not always delivered to the victims of the Nazi regime. The Committee also takes note with satisfaction of the information provided by the delegation about the special legal regime that was set up in Germany to grant reparations for victims of past atrocities and the affirmation that, since enforced disappearances are committed with the involvement of State agents, compensation would be the responsibility of the State (federal or *Länder*, depending on the case). It also welcomes the additional information provided by the State party after the dialogue in relation to the different forms of compensation and reparation available under German law. Furthermore, in relation to the declaration made by the State party on article 24, paragraph 4, of the Convention, the Committee takes note of the clarifications provided in that respect in the replies to the list of issues (CED/C/DEU/Q/1/Add.1, paragraph 79) and by the delegation during the dialogue. However, the Committee is concerned that such a stance may ultimately affect the enjoyment of the right of victims to reparation (art. 24).

25. **The Committee recommends that the State party ensure that in all circumstances it will take all the appropriate measures at its disposal to guarantee that victims of enforced disappearance can effectively enjoy their right to obtain full reparation in accordance with article 24 of the Convention.**

26. The Committee notes the information provided by the State party that "since there are no known cases of enforced disappearance in Germany, there are no special provisions governing the status of disappeared persons." In this respect, the Committee observes that, according to the State party, the general law regarding missing persons would apply, which "governs the criteria pursuant to which missing persons whose fate cannot be established can be declared dead" (CED/C/DEU/1, paragraph 164). The Committee considers that a system governing the legal situation of disappeared persons whose fate has not been clarified, such as the one described by the State party, does not accurately reflect the complexity of enforced disappearance. In particular, it considers that, given the continuous nature of enforced disappearance, as a matter of principle and unless concrete evidence has demonstrated otherwise, there would be no reason to presume the death of the disappeared person until his/her fate has been clarified (art. 24).

27. **The Committee invites the State party to consider reviewing its legislation, with a view to incorporating specific legal provisions establishing a procedure to obtain a**

declaration of absence by reason of enforced disappearance that adequately address the legal situation of disappeared persons and that of their relatives in areas such as social welfare, financial matters, family law and property rights.

28. While taking note of the current provisions of the criminal law concerning the abduction of minors from the care of their parents, and those related to documents, in particular sections 169 (falsification of personal status) and 271 (causing wrong entries to be made in public records), as well as the information provided by the delegation in this respect, the Committee notes with concern that there are no provisions that specifically reflect the acts set out in article 25, paragraph 1, of the Convention. In this respect, and while taking note of the position of the State party that since there are no concrete cases there is no need to enact specific legislation, the Committee recalls the obligation incumbent on States parties according to article 25, paragraph 1, of the Convention to prevent and punish the acts it describes (art. 25).

29. **The Committee recommends that the State party review its criminal legislation with a view to incorporating as specific offences the acts described in article 25, paragraph 1, of the Convention and provide appropriate penalties that take into account the extreme seriousness of the offences.**

D. Dissemination and follow-up

30. The Committee wishes to recall the obligations undertaken by States when ratifying the Convention and, in this connection, urges the State party to ensure that all the measures it adopts, irrespective of their nature or the authority from which they emanate, are in full accordance with the obligations it assumed when ratifying the Convention and other relevant international instruments. In this regard, and given its federal nature, the Committee calls for the State party to ensure that the Convention is applied in full at both the federal and *Land* level.

31. The Committee also wishes to emphasize the particularly cruel effect of enforced disappearances on the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisals as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves were subjected to disappearance or because they suffer the consequences of the disappearance of their relatives, are especially vulnerable to numerous human rights violations, including identity substitution. In this context, the Committee places special emphasis on the need for the State party to ensure that gender perspectives and child-sensitive approaches are used in implementing the rights and obligations set out in the Convention.

32. The State party is encouraged to disseminate widely the Convention, its report submitted under article 29, paragraph 1, of the Convention, the written replies to the list of issues drawn up by the Committee and the present concluding observations, in order to raise awareness among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the State party and the general public. The Committee also encourages the State party to promote the participation of civil society in the actions taken in line with the present concluding observations.

33. In accordance with the Committee's rules of procedure, by 28 March 2015 at the latest, the State party should provide relevant information on its implementation of the Committee's recommendations, as contained in paragraphs 8, 9 and 29.

34. Under article 29, paragraph 4, of the Convention, the Committee requests the State party to submit, no later than 28 March 2020, specific and updated information on the implementation of all its recommendations and any other new information on the fulfilment of the obligations contained in the Convention, in a document prepared in accordance with paragraph 39 of the guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention (CED/C/2). The Committee encourages the State party to promote and facilitate the participation of civil society in the preparation of this information.